Can an Employer increase a disciplinary sanction on appeal?

This issue was considered in the recent case of McMillan v Airedale NHS Foundation Trust [2014] EWCA. The employer, an NHS Trust, had incorporated a formal and detailed disciplinary procedure into the employee’s contract. The employee was subject to disciplinary action and was given a written warning. The employee appealed the sanction and as the employer was considering an increased sanction, the employee sought a High Court injunction restraining the Trust from imposing a more severe sanction.

The High Court granted the injunction and the NHS appealed the High Court’s decision to the Court of Appeal. The Court of Appeal upheld the High Court’s decision and held that the Trust’s contractual procedure did not permit it to increase a disciplinary penalty on appeal. The Court of Appeal’s decision was based on the following reasons:-

- The right of appeal existed for the benefit of the employee and not the employer.
- The Trust’s code stated that there was no further right of appeal which would mean that the employee would be left with no right of appeal against a more serious sanction of dismissal.
- The Trust’s code referred to the ACAS guide which expressly states that an appeal should not result in an increased sanction.

Lessons for Northern Ireland

Although Court of Appeal decisions in England and Wales are not binding in this jurisdiction, they are of persuasive value and in this instance Courts and Tribunals in Northern Ireland would in all likelihood follow this decision.

The provisions in the ACAS guidance referred to in this decision are mirrored in the LRA Guidance on Handling Discipline and Grievances at work which provides as follows:-

“An appeal must never be used to punish the employee for appealing against the original decision. The appeal should not result in any increase in penalty as this may put people off appealing in the future.”

In summary therefore, if an employer wishes to reserve the right to increase a sanction on appeal, it should ensure that there is an additional further appeal or review and that they make express provision for it in the disciplinary procedure.